Supreme Court, U.S.
FILED
99 591 OCT - 5 1999
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO AVELAR,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF IDAHO

PETITION FOR A WRIT OF CERTIORARI

DENNIS BENJAMIN
(Counsel of Record)
NEVIN, HERZFELD,
BENJAMIN & McKAY LLP
P.O. Box 2772
303 W. Bannock Street
Boise, Idaho 83701
(208) 343-1000
Attorneys for Petitioner.

October 5, 1999

Washington, D.C. • THIEL PRESS • (202) 328-3288

3647

QUESTIONS PRESENTED FOR REVIEW

1. When does jeopardy attach for purposes of the multiple punishments bar of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution?

2. Following Mr. Avelar's conviction, one of the state's main witnesses against him, a police officer, was convicted of RICO violations for acts the officer committed prior to the time of Mr. Avelar's trial. However, none of those illegal acts were disclosed to the defense. Does this non-disclosure of *Brady*[1] evidence require a new trial?

---

[1] *Brady v. Maryland*, 373 U.S. 784, 83 S.Ct. 1194, 10 L.Ed.-2d 215 (1963).

TABLE OF CONTENTS

Page

Questions Presented For Review i

Table Of Authorities iii

Opinion Below 1

Jurisdiction 1

Constitutional Provisions. 2

Statement Of The Case 2

Reasons For Granting The Writ:

I. Certiorari Should Be Granted To Determine When Jeopardy Attaches For Purposes Of The Constitutional Prohibition Against Multiple Punishments Because It Is An Important Question Of Federal Law Which Has Not Yet Been, But Should Be, Decided By This Court 6

II. Certiorari Should Be Granted To Determine Whether Knowledge In The Possession Of A Police Officer Who Is Going To Testify For The State Must Be Disclosed To The Defense Under *Brady* 17

Conclusion 18

APPENDICES:

Appendix A – Opinion of the Idaho Supreme Court in *State v. Avelar*, ___ Idaho ___, 979 P.2d 648 (Idaho 1999). 1a

Appendix B – Order denying Petition for Rehearing in *State v. Avelar, supra* (July 7, 1999). 13a

Page

TABLE OF AUTHORITIES

Federal Cases:

Brady v. Maryland, 373 U.S. 784, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ..... i, 4, 17, 18

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) 7

Ex Parte Lange, 85 U.S. 163, 21 L.Ed. 872 (1873) 8, 15

Kennedy v. United States, 330 F.2d 26 (9th Cir. 1964) 14

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 767 (1969), *overruled on other grounds*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) 6

Oakes v. United States, 872 F.Supp. 817 (E.D. Wash. 1994) 9, 10

Oakes v. United States, 92 F.3d 1195 (9th Cir. 1996) 9, 10

United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994) 10, 11, 12, 13

United States v. Andersson, 83 F.2d 1450 (9th Cir. 1987) 14

United States v. Andrews, 146 F.3d 933 (D.C. Cir. 1998) 7,16

United States v. Benz, 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed.2d 354 (1931) 8

United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) 8, 13, 14, 15

Federal Cases, continued: Page

United States v. Dixon, 508 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) 6

United States v. Faber, 57 F.3d 873 (9th Cir. 1995) 15

United States v. Ford, 632 F.2d 748 (9th Cir. 1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1399, 67 L.Ed.2d 369 (1981). 7, 14

United States v. Groceman, 882 F.Supp. 976 (E.D. Wash. 1995). 13, 14, 15

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) 12, 13

United States v. Pierce, 60 F.3d 886 (1st Cir. 1995) 15

United States v. Pledger, 887 F.Supp. 1400 (D. Kan. 1995) 12, 13

United States v. Stanwood, 872 F.Supp. 791 (D.Or. 1994) 10, 11, 12

United States v. Tamez, 881 F.Supp. 460 (E.D.Wash. 1995) 11, 12

United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) 6, 7, 11

United States v. Von Moos, 660 F.2d 749 (9th Cir. 1981) . . . . . *passim*

United States v. Wilson, 116 F.3d 1066 (5th Cir. 1997) 6

State Cases:

People v. Massie, 19 Cal. 4th 550, 79 Cal.Rptr.2d 816, 967 P.2d 29 (Cal. 1998) 16

State Cases, continued: Page

State v. Avelar, 124 Idaho 319, 895 P.2d 353 (Idaho App. 1993) 1, 3

State v. Avelar, 129 Idaho 700, 931 P.2d 1218 (Idaho 1997) 1, 4

State v. Avelar, 129 Idaho 704, 931 P.2d 1222 (Idaho App. 1996) 1, 4

State v. Avelar, ___ Idaho ___, 979 P.2d 648 (Idaho 1999) 1

Federal Statutes:

28 U.S.C. §1257 2

28 U.S.C. §2255 12

Other Authorities:

United States Constitution, Fifth Amendment 2

United States Constitution, Fourteenth Amendment 2

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Antonio Avelar, pursuant to Supreme Court Rules 10 and 12, respectfully prays that a writ of certiorari issue to review the April 2, 1999, decision of the Supreme Court of the State of Idaho. A Petition for Rehearing of this decision was denied by the Idaho Supreme Court on July 7, 1999.

OPINION BELOW

A jury found Mr. Avelar guilty of delivery of a controlled substance (cocaine) on March 1, 1991. The Idaho Court of Appeals reversed that conviction in *State v. Avelar*, 124 Idaho 317, 895 P.2d 353 (Idaho App. 1993). Mr. Avelar was found guilty in a second trial on March 29, 1994. The Court of Appeals and ultimately the Idaho Supreme Court affirmed the conviction from the second trial. *State v. Avelar*, 129 Idaho 700, 931 P.2d 1218 (Idaho 1997, *affg* 129 Idaho 704, 931 P.2d 1222 (Idaho App. 1996).

Mr. Avelar then filed a Motion to Dismiss or In The Alternative For A New Trial in the trial court. That motion was denied. Mr. Avelar appealed that denial. The denial of the motion to dismiss was affirmed by the Idaho Supreme Court in *State v. Avelar*, ___ Idaho ___, 979 P.2d 648 (Idaho 1999). It is from this Idaho Supreme Court decision that Mr. Avelar seeks a grant of certiorari.

JURISDICTION

The order denying Mr. Avelar's Petition for Rehearing of the decision of the Idaho State Supreme Court was

entered on July 7, 1999. This Petition for Writ of Certiorari is timely because it is being filed within ninety days of that date, pursuant to S.C.R. 13(3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The **Fifth Amendment of the United States Constitution** provides in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, . . . nor be deprived of life, liberty or property without due process of law . . .

The **Fourteenth Amendment of the United States Constitution** provides in pertinent part:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On November 28, 1989, the State of Idaho filed a complaint, alleging that Mr. Avelar had committed the crimes of Conspiracy to Deliver a Controlled Substance, Cocaine (Count 1), Delivery of a Controlled Substance, Cocaine (Count 2), and Failure to Permanently Affix Official Indicia of the State Tax Commission (Count 3). On January 12, 1990, Counts One and Three were dismissed and Mr. Avelar was bound over on Count Two. The State filed its Information on January 13, 1990 and amended it on July 16, 1990 to cite the correct code section.

Trial was held on Count Two on February 26 and March 1, 1991. Mr. Avelar was found guilty.

As a result of the conviction, a Notice of Jeopardy Assessment and demand for Immediate Payment was made on May 1, 1991. In this document, the Tax Commission for the State of Idaho demanded that Mr. Avelar pay a Drug Stamp Tax of $49,200.00 for possessing the same controlled substance he was convicted of possessing in this case. On May 15, 1991, the State Tax Commission filed a Notice of Tax Lien on Mr. Avelar's property.

On August 13, 1991, the Trial Court issued a Memorandum Opinion sentencing Mr. Avelar to 10 years imprisonment with the first two years fixed. Mr. Avelar filed his Notice of Appeal and the sentence was stayed pending the appeal.

On August 31, 1992, Mr. Avelar filed an appeal from the Tax Commission's Drug Tax Stamp Jeopardy Assessment.

The criminal conviction was reversed by the Idaho Court of Appeals on August 30, 1993. *State v. Avelar*, 124 Idaho 319, 859 P.2d 353 (Idaho App. 1993). The Court reversed the conviction because the prosecution had violated Mr. Avelar's due process rights by failing to disclose clearly exculpatory evidence and by lying to the jury in its opening statement.

The retrial of the case began on March 29, 1994. Mr. Avelar was found guilty. His post-trial motions for acquittal and for a new trial were denied and he was given the same sentence as he had received after the first trial, even though the presentence investigator recommended probation partly because Mr. Avelar had spent nearly five years without incident on supervised release during the course of the two trials.

A Notice of Appeal was filed and again sentence was stayed pending appeal.

In April of 1995, Mr. Avelar and the Tax Commission entered into a Compromise and Closing Agreement as to the Drug Stamp Tax Jeopardy Assessment. Mr. Avelar agreed to dismiss his tax appeal and pay an agreed amount of Drug Stamp taxes. On May 9, 1995, Mr. Avelar's Drug Stamp tax appeal was dismissed because "the matter had been settled to the satisfaction of all parties."

On June 13, 1993, the Idaho Court of Appeals affirmed Mr. Avelar's conviction. *State v. Avelar,* 129 Idaho 704, 931 P.2d 1222 (Idaho App. 1996). Mr. Avelar then filed a Petition for Review with the Idaho Supreme Court which was granted. Ultimately, the Idaho Supreme Court affirmed the conviction. *State v. Avelar,* 129 Idaho 700, 931 P.2d 1218 (Idaho 1997).

Thereafter, Mr. Avelar filed a Motion to Dismiss, or in the Alternative, for a New Trial in the trial court. Mr. Avelar argued that the payment to the Tax Commission was punishment for purposes of the double jeopardy clauses of the federal and state constitutions. Therefore, the criminal case should be dismissed because he had already been subjected to one punishment, leaving the District Court without power to further punish him. Second, he argued that the case should be dismissed under ICR 48 in the interests of justice. Third, he argued that he should be granted a new trial on the basis of newly discovered evidence which had been withheld from him by the State in violation of the Fourteenth Amendment and *Brady v. Maryland, supra.*

The evidence which had been withheld was evidence that John Nunez, one of the State's principal witnesses against Mr. Avelar, had engaged in illegal activity during the time between the first and second trials. Nunez was a confidential informant during the investigation of Mr. Avelar. By the time of the second trial, he had become

a police officer. Also, by the time of the second trial, Nunez had committed a RICO violation, even though he would not be convicted for it until after the second trial. Mr. Avelar was unable to impeach Nunez at the second trial with evidence of Nunez's criminal activity because that criminal activity was never disclosed to the defense.

The Motion To Dismiss Or In The Alternative For a New Trial was denied. Mr. Avelar appealed and the Idaho Supreme Court, in an opinion issued April 2, 1999, affirmed Mr. Avelar's conviction. A Petition For Rehearing was timely filed. That Petition was denied on July 7, 1999.

In affirming Mr. Avelar's conviction, thd Idaho Supreme Court rejected the holding of *United States v. Von Moos*, 660 F.2d 749 (9th Cir. 1981). *Von Moos* recognized that the Double Jeopardy Clause of the Fifth Amendment protects against both a second prosecution and a second punishment and that while for purposes of multiple prosecutions jeopardy attaches at some early point in the proceedings, for purposes of multiple punishments jeopardy does not attach until the defendant begins serving the sentence. Based upon *Von Moos*, Mr. Avelar argued that he was punished for possession of the cocaine when he paid the Drug Stamp Tax and that he could not now be punished a second time by being sent to prison. The Idaho Supreme Court held that *Von Moos* was no longer sound law and that a distinction between punishment and prosecution with regard to the attachment of jeopardy is not warranted or necessary.

On the *Brady* issue, the Idaho Supreme Court held that even though Nunez was himself a police officer at the time of the second trial, his personal knowledge of

his own criminal acts could not be imputed to the prosecutor and therefore did not have to be disclosed. Citing *United States v. Wilson*, 116 F.3d 1066 (5th Cir. 1997), the Idaho Court stated that "Possession of information held in the minds of government witnesses is generally not imputed to the possession unless that information is discovered by police or prosecutors." Then disregarding Nunez's status as a police officer, who clearly had discovered his own criminal acts prior to the second trial, the Court held that because Nunez was only a confidential informant at the time of the investigation and testified only about his role as confidential informant, knowledge of his criminal activity need not be disclosed to the defense.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHEN JEOPARDY ATTACHES FOR PURPOSES OF THE CONSTITUTIONAL PROHIBITION AGAINST MULTIPLE PUNISHMENTS BECAUSE IT IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT YET BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The Fifth Amendment protects against both multiple prosecutions and multiple punishments for the same offense. *United States v. Dixon*, 508 U.S. 688, 113 S.Ct. 2849, 2855-56, 125 L.Ed.2d 556 (1993); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). And, this Court has determined that *in personam* civil penalties, like fines and taxes, can be punishment for purposes of Fifth Amendment double jeopardy analysis. *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 2141, 135 L.Ed.2d

549 (1996); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). However, this Court has never determined when jeopardy attaches for purposes of the constitutional prohibition against multiple punishments, whether at the time the proceedings resulting in the punishment are commenced or whether at the time the punishment is actually imposed. *See, United States v. Andrews*, 146 F.3d 933, 941 (D.C. Cir. 1998), noting that this issue has not been determined by the Supreme Court.

No Supreme Court case law is available to guide lower federal courts and the various state courts when presented with the necessity of determining which punishment is the successive punishment for Fifth Amendment challenges. This case presents an excellent opportunity for this Court to resolve this issue as in this case it is necessary to determine when jeopardy attached in the criminal case for purposes of the constitutional protection against multiple punishments in order to determine whether the tax or the criminal sentence was the successive punishment.

In *United States v. Von Moos, supra*, the Ninth Circuit wrote: "Jeopardy attaches in the double punishment context when the defendant begins serving the sentence." *Von Moos*, 660 F.2d at 749, citing *United States v. Ford*, 632 F.2d 1354, 1380 (9th Cir. 1980). The Ninth Circuit went on to conclude:

> Because Von Moos has not begun serving a sentence pursuant to the challenged order, jeopardy has not attached. If we were to reverse and remand for sentencing, the sentence on remand would not constitute double jeopardy.

Von Moos, 660 F.2d at 749.

This conclusion by the Ninth Circuit was in accord with Supreme Court law. In *Ex Parte Lange*, 85 U.S. 163, 167, 173, 21 L.Ed. 872 (1873), the trial court had erroneously imposed both imprisonment and a fine even though it was authorized by statute to impose only one or the other of these two punishments. Lange had paid the fine and served five days in prison. The trial court then resentenced him to a year's imprisonment. This Court held that as the defendant had paid the fine, thus suffering one of the alternative punishments, the power of the court to further punish was gone. This Court also noted that to impose a year's imprisonment after five days had been served was to punish twice for the same offense. In its opinion this Court emphasized the importance of the constitutional prohibition against multiple punishments for the same offense:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.

85 U.S. at 168.

Later, in *United States v. Benz*, 282 U.S. 304, 307, 51 S.Ct. 113, 114, 75 L.Ed. 354 (1931), this Court stated in dicta that the trial court may not increase a sentence, if the defendant has begun service of his sentence, indicating that jeopardy attached for purposes of the protection against multiple punishments when the defendant began serving the sentence. In 1980, this Court limited *Lange* and *Benz* to those situations where the Congress or the state legislatures have not authorized by statute more than one penalty or a government right to appeal a sentence on the basis that it is not severe enough. *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 438-39, 66 L.Ed.2d 328 (1980). However, this Court has never overruled *Lange* or *Benz*. Therefore, the law

remained that if a defendant had suffered a punishment he could not be given a second punishment for the same offense absent legislation specifically allowing double punishment and that once a punishment had been imposed, the power of the Court to further punish was gone. The law also remained that jeopardy for purposes of the multiple punishments prong of the Fifth Amendment attached when the defendant began serving the sentence.

However, later case law on the question of when jeopardy attached for purposes of the multiple punishments prohibition became confusing.

In 1994, *Oakes v. United States,* 872 F.Supp. 817 (E.D. Wash. 1994), was issued. In that case, on March 6, 1991, Oakes pled guilty to manufacturing marijuana and agreed to forfeit all interest in his home to the federal government in accord with a civil forfeiture complaint the government had previously filed. On January 4, 1992, Oakes reported to the federal corrections facility to begin serving his sentence on a conviction for manufacturing marijuana. On January 9, 1992, a decree of forfeiture was entered against Oakes' home. 872 F.Supp. at 819. After determining that the civil forfeiture and the prison sentence represented multiple punishments for purposes of the double jeopardy clause, the District Court had to determine which punishment came first – the forfeiture or the prison sentence. The Court found that the interest in the home was forfeited when Oakes entered his plea pursuant to the plea agreement but that he was not sentenced until later. Thus, the prison sentence was the second and prohibited punishment. (*Oakes* was later reversed in an unpublished decision, *Oakes v. United States,* 92 F.3d 1195 (9th Cir. 1996). However, the District Court addressed many issues besides the question of when jeopardy attached for purposes of determin-

ing which punishment came second, therefore, it is impossible to determine from this unpublished reversal whether the Ninth Circuit disagreed with the District Court that jeopardy for punishment purposes did not attach to the criminal sentence until Oakes reported to the federal prison to begin serving his term.)

About eight weeks after *Oakes* was decided by the District Court, *United States v. Stanwood*, 872 F.Supp. 791 (D. Or. 1994), was decided by another District Court. In that case, Stanwood had moved to vacate his conviction and sentence for manufacturing marijuana on the basis that his criminal conviction violated the Double Jeopardy clause because it occurred after he had been punished for the same offense through civil forfeiture. The District Court noted that the second of two penalties imposed for the same offense triggers the protection against double jeopardy and further noted that the question of how to determine the date on which jeopardy attached was not addressed in earlier Ninth Circuit precedent. 872 F. Supp. at 798. The Court then said that the answer was easy in a criminal proceeding where a guilty plea had been entered:

> The rule in this circuit is that jeopardy attaches at the time a guilty plea is accepted by the court.

972 F.Supp. at 798. The District Court noted in a footnote the following with regard to *Von Moos*:

> Stanwood, relying on *United States v. Von Moos*, 660 F.2d 748, 749 (9th Cir. 1981), argues that jeopardy attaches at the time a criminal defendant begins serving his or her sentence, not at the time a plea is entered. Although I agree that the *Von Moos* rule applies in cases of double punishment, this is not such a case. In [*United States v.*] *$405,089.23* [*U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994)], the

> Ninth Circuit recognized that the pursuit of criminal and civil forfeiture penalties against the same defendant for the same conduct violates the constitutional prohibition against successive prosecutions. Because this action is analogous to *$405,089.23*, the date of Stanwood's sentencing is not relevant for present purposes.

972 F.Supp. at 798 n.2.

While the *Stanwood* court was correct that *$405,089.23* did state that a civil forfeiture based upon the same conduct as resulted in a criminal conviction violates the double jeopardy protection against successive prosecutions, *$405,089.23* did not state that the protection against successive punishments could not also be involved. Thus, the *Stanwood* conclusion that *Von Moos* could not apply to Stanwood's situation was not well analyzed. Moreover, *$405,089.23* was subsequently reversed by *United States v. Ursery, supra,* which held that *in rem* civil forfeitures are not punishment for purposes of the Double Jeopardy Clause, leaving doubt about the validity of relying upon it to find that *Von Moos* should not be relied upon in determining when jeopardy attaches for purposes of the constitutional prohibition against double punishment.

A few months after *Stanwood*, another District Court wrestled with the issue in *United States v. Tamez*, 881 F.Supp. 460 (E.D. Wash. 1995). Tamez had filed a Motion to Set Aside or Correct A Sentence because his criminal conviction for drug offenses constituted a second punishment. There the Court wrote:

> Whether the type of case presented by Tamez's factual situation, where a person is subject to both a civil forfeiture and criminal prosecution for the same offense, falls under the 'successive prosecu-

> tions' or 'multiple punishments' context, is of the utmost importance. The reason for this is that the point at which jeopardy attaches appears to differ according to the context involved.
>
> For example, where a person claims to have been subjected to 'successive prosecutions' for the same offense, jeopardy is considered to attach in the initial criminal jury trial once the jury is empaneled and sworn. . . .
>
> However, the analysis apparently differs when a person claims not to have been subject to 'successive prosecutions' but to 'multiple punishments' for the same offense. The Ninth Circuit has articulated this distinction: 'Jeopardy attaches in the double punishment context when the defendant *begins serving the sentence.' United States v. Von Moos* . . .

881 F.Supp. at 463-464 (emphasis original).

The *Tamez* court then went on to hold, based upon *$405,089.23* and *Stanwood,* that Tamez's case was one of successive prosecutions and hence jeopardy attached in his criminal case at the latest when he was convicted by a jury. While the ongoing validity of the *Tamez* decision may be called into doubt by the subsequent reversal of *$405,089.23, Tamez* does show that *Von Moos* remained good law. It was just not clear when it applied.

Yet another District Court tackled the problem in *United States v. Pledger,* 887 F.Supp. 1400 (D. Kan. 1995). There, Pledger had moved under 28 U.S.C. §2255 attacking his sentences and convictions because they took place subsequent to a civil forfeiture of his property. The *Pledger* court wrote:

> Upon a thorough review of the Supreme Court opinions cited above and the various lower court opin-

> ions dealing with this issue, it is apparent that a great deal of confusion exists as to whether separate civil forfeiture and criminal prosecutions should be analyzed under a 'successive prosecutions' or a 'multiple punishments' analysis. In [*United States v.*] *Halper,*]490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.-2d 487 (1989)], the Supreme Court, in setting forth its holding, speaks in terms of successive punishments. *Halper,* 490 U.S. at 448, 109 S.Ct. at 1902 ('under the Double Jeopardy Clause a defendant *who already has been punished* in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as deterrent or retribution') (emphasis added). In its analysis of the issue in *United States v. $405,089.23 United States Currency,* 33 F.3d 1210 (9th Cir. 1994), the Ninth Circuit focuses on the Double Jeopardy Clause's protections against multiple prosecutions. *Id.* at 1215.

887 F.Supp. at 1405 (footnote omitted).

The *Pledger* court went on to find that it did not matter which analysis applied in this case as in either analysis jeopardy attached in the criminal case prior to the civil forfeiture.

Then in *United States v. Groceman,* 882 F.Supp. 976 (E.D. Wash. 1995), *Von Moos* was prematurely pronounced dead, not by the Supreme Court or Ninth Circuit, but by a District Court in Washington. In that case, Groceman argued that his criminal sentences were successive punishments given his prior forfeiture of certain assets. The District Court rejected this argument stating that in light of *United States v. DiFrancesco, supra, Von*

Moos was no longer good law. The *Groceman* Court wrote:

> In *DiFrancesco*, the government appealed a sentence imposed by the district court, arguing that the district court had abused its discretion in imposing that particular sentence. The Second Circuit dismissed the government's appeal on double jeopardy grounds. 449 U.S. at 123, 101 S.Ct. at 430. The Supreme Court reversed, concluding that jeopardy does not attach to a sentence until the defendant has a legitimate expectation in the finality of his sentence. 449 U.S. at 137-139, 101 S.Ct. at 437-38.
>
> The Ninth Circuit has acknowledged that Kennedy's[2] statements regarding the point at which jeopardy attaches have been superseded by *DiFrancesco*. *See, e.g.*, [*United States v.*] *Andersson*, 813 F.2d [1450] at 1461 [(9th Cir. 1987)]. Indeed, in *Andersson*, the circuit court held that a defendant could be resentenced even though he had begun serving his sentence. 'Andersson', the court said, had 'no legitimate expectation of finality in the original sentence when he has placed those sentences in issue by direct appeal and has not completed serving a valid sentence.' 813 F.2d at 1461.

882 F.Supp. at 978.

While the *Groceman* court read *DiFrancesco* and *Andersson* to stand for the proposition that jeopardy attaches at the same time for both successive prosecution

---

[2] *Kennedy v. United States*, 330 F.2d 26 (9th Cir. 1964). *Von Moos* cites *United States v. Ford*, 632 F.2d 748 (9th Cir. 1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1399, 67 L.Ed.2d 369 (1981), for the proposition that for purposes of multiple punishment jeopardy attaches when the defendant begins serving his or her sentence. *Ford*, in turn, relied upon *Kennedy* for this proposition.

and successive punishment analysis, neither opinion states this. Rather, both opinions conclude that jeopardy does not attach until even after a defendant begins serving a criminal sentence, until some point when there is a recognizable expectation of finality in the sentence. "The Supreme Court . . . conclud[ed] that jeopardy does not attach to a sentence until the defendant has a legitimate expectation in the finality of his sentence." *Groceman,* 882 F.Supp. at 978, citing *DiFrancesco.*

The Ninth Circuit then decided *United States v. Faber,* 57 F.3d 873 (9th Cir. 1995). In that case, Faber argued that his criminal conviction violated double jeopardy law. He pled guilty to drug offenses on March 2, 1994. A final judgment of forfeiture was entered on March 25, 1994, and another forfeiture judgment was entered on April 12, 1994. The Ninth Circuit held that jeopardy attached in the criminal case when Faber pled guilty. Although the Ninth Circuit cited *Von Moos,* it simply stated that *Von Moos* dealt with successive punishment and therefore did not apply to Faber's case. The Court did not provide any analysis as to why this was the case.

Later, in *United States v. Pierce,* 60 F.3d 886, 890 (1st Cir. 1995), the First Circuit stated that "the law of double jeopardy is quite complicated, and often (as here), the question whether a second proceeding violates the Clause is a close one." It then concluded that jeopardy attaches in a criminal case for purposes of successive prosecutions at the time the jury is empaneled and sworn and refused to apply any different analysis for purposes of the prohibition of successive punishments.

Review of these cases shows that the law is not settled on the question of whether jeopardy attaches at the same point both for the prohibition against successive prosecutions and successive punishments. *Lange* and *Von Moos*

remain good law. It is not clear however as to when they apply. *See, People v. Massie,* 19 Cal.4th 550, 79 Cal.-Rptr.2d 816, 967 P.2d 29, 38 n.3 (Cal. 1998), (noting that the federal courts are not in agreement as to whether jeopardy attaches when the guilty plea is accepted or when the sentence is imposed) and *United States v. Andrews, supra,* (noting that the Supreme Court has not had the occasion to determine whether the timing of attachment is different for the multiple punishments prong as compared to the multiple prosecutions prong).

The question of when jeopardy attaches for purposes of the prohibition against multiple punishments is important. Criminal defendants, especially drug defendants, are very often prosecuted in criminal actions and also subjected to an array of civil penalties. For example, in Idaho, they are punished under the guise of drug taxes. In other states, they are subjected to civil fines and other *in personam* penalties. Both prosecutors and defendants have a great interest in knowing for certain when jeopardy attaches for purposes of the constitutional protection against multiple punishments. A Supreme Court opinion on this question would be very valuable in assuring that judicial resources are not squandered in unconstitutional proceedings and that all penalties sought and achieved can withstand constitutional scrutiny.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER KNOWLEDGE IN THE POSSESSION OF A POLICE OFFICER WHO IS GOING TO TESTIFY FOR THE STATE MUST BE DISCLOSED TO THE DEFENSE UNDER *BRADY*.

In this case, Nunez, a police officer by the time of the second trial, testified about his role as a confidential informant in the investigation of Mr. Avelar. At the time Nunez testified, he knew that he had committed racketeering offenses which could have been used to impeach him at Mr. Avelar's trial. However, these offenses were not revealed to the defense as required by *Brady v. Maryland, supra.* While acknowledging that the duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case but also of all government agents having a significant role in investigating and prosecuting the case, the Idaho Supreme Court held that there was no duty to reveal Nunez's criminal acts becauze Nunez was only a paid informant and not a police officer at the time of the investigation. The Idaho Court let pass without comment the fact that Nunez was a police officer by the time of the second trial.

The prosecution of drug cases in this country is dependent in almost every situation upon the use of confidential or paid informants. The DEA or its state equivalents simply could not operate without reliance upon confidential informants. Moreover, it is not unusual for informants to become law enforcement officers. That switch is analogous to and no more unusual than the change of the paid consultant to the full time employee in the non-law enforcement business world. Yet, there is no Supreme Court case which considers the scope of

the *Brady* obligation in relation to these informants/police officers. Guidance on this issue will greatly benefit both those who prosecute and those who defend drug cases.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the decision of the Idaho State Supreme Court.

Respectfully submitted this 5th day of October, 1999.

DENNIS BENJAMIN
NEVIN, HERZFELD,
BENJAMIN & McKAY LLP
P.O. Box 2772
303 W. Bannock Street
Boise, Idaho 83701
(208) 343-1000

Attorneys for Petitioner.

APPENDIX A

1999 Opinion No. 38

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 24020

Cite as: 99.8 ISCR 299

STATE OF IDAHO,

Plaintiff-Respondent

v.

ANTONIO AVELAR,

Defendant-Appellant.

Appeal from the District of the Fifth Judicial District, State of Idaho, Twin Falls County. Honorable Daniel B. Meehl, District Judge.

Order denying motion to dismiss or for a new trial, following conviction for delivery of a controlled substance, *affirmed.*

ATTORNEYS:

Nevin, Herzfeld & Benjamin, Boise, for appellant. Dennis K. Benjamin argued.

Hon. Alan G. Lance, Attorney General, Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

Boice, November 1998 Term
Filed: April 2, 1999
Frederick C. Lyon, Clerk

WALTERS, Justice

This is an appeal from the denial of Antonio Avelar's "Motion to Dismiss or, in the Alternative, For A New Trial," which was brought after this Court upheld his conviction for delivery of a controlled substance. We affirm the district court's denial of Avelar's motion.

BACKGROUND AND PRIOR PROCEEDINGS

A jury found Avelar guilty of delivery of a controlled substance (cocaine) on March 1, 1991. The Court of Appeals reversed. *State v. Avelar*, 124 Idaho 317, 859 P.2d 353 (Ct. App. 1993) (Avelar I), and Avelar was retried on March 29, 1994. Again, the jury found Avelar guilty. The trial court denied Avelar's post-trial motions for the acquittal and for a new trial, and sentenced him to the custody of the Board of Corrections for ten years, with two years fixed as a minimum term of confinement.

In a separate proceeding initiated shortly after Avelar's first trial, the Idaho State Tax Commission assessed $49,200 in taxes and penalties[1] under Idaho's drug stamp act.[2] Two weeks later the Commission filed a Notice of Tax Lien on Avelar's property. In April 1995, while the appeal from his second trial was pending, Avelar settled with the Tax Commission by paying $1223.98.

---

[1] Avelar's tax liability included the amount of the tax ($24,600) plus a 100% penalty for failure to pay the tax.

[2] A criminal charge for failure to permanently affix official indicia of the state tax commission was included in the complaint against Avelar. However, this count was dismissed beore trial.

The Court of Appeals, and ultimately this Court, affirmed Avelar's criminal conviction in the second trial. *State v. Avelar*, 129 Idaho 700, 931 P.2d 1218 (1996) (Avelar III), *aff'g* 129 Idaho 704, 931 P.2d 1222 (Avelar II). However, Avelar has not yet served any of the imposed prison sentence. Before the execution of his sentence, Avelar filed another Motion to Dismiss, or in the Alternative, for a New Trial. Avelar now appeals from the district court's denial of this motion. Avelar's appeal raises the following issues:

1. Would the execution of Avelar's sentence after he paid the drug stamp tax violate the multiple punishments bar of either the state or federal constitutions?
2. Did the district court abuse its discretion by denying Avelar's Rule 34 motion for a new trial?
3. Did the district court abuse its discretion by denying Avelar's Rule 48 motion to dismiss in the interests of justice?

I.
DOUBLE JEOPARDY

Avelar argues that the execution of his sentence after he has already paid the drug stamp tax would be a double punishment in violation of the double jeopardy provisions in the Constitutions of the State of Idaho and the United States. We disagree.

The prohibition against double jeopardy encompasses both multiple prosecutions and multiple punishments for the same offense. *State v. Pizzuto*, 119 Idaho 742, 756, 810 P.2d 680, 694 (1991); *United States v. Dixon*, 509 U.S. 688, 696 (1993); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The multiple prosecution component

of double jeopardy "ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." *Ohio v. Johnson*, 467 U.S. 493, 498-99 (1984). The multiple punishment component has been interpreted to provide two different protections. First, this component "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Id.* at 499. It thus prohibits the imposition of a sentence in excess of that authorized by the legislature. Second, in *U.S. v. Halper*, 490 U.S. 435 (1989), the United States Supreme Court extended this aspect of double jeopardy to prohibit punishments imposed in separate proceedings even when authorized by the legislature.

Double jeopardy protection is triggered by the attachment of jeopardy. *Crist v. Bretz*, 437 U.S. 28, 32-33 (1978). In this case, jeopardy attached when the jury was sworn to hear Avelar's first criminal trial. *State v. Stevens*, 126 Idaho 822, 892 P.2d 889 (1995).

In *Avelar II*, the Court of Appeals rejected Avelar's contention that his second trial violated his double jeopardy protections. The Court of Appeals rejected Avelar's contention under the United States Constitution because Avelar's first trial was reversed for prosecutorial misconduct, and "retrial following the reversal of a conviction on grounds other than the insufficiency of the evidence does not offend double jeopardy principles." *Avelar II* at 706, 931 P.2d at 1224. The Court of Appeals rejected Avelar's argument that the Idaho Constitution provides greater protection because Avelar raised the issue for the first time on appeal. Idaho Criminal Rule 16(b)(6) pro-

vides that all double jeopardy challenges must be raised prior to trial. The failure to make a timely motion to dismiss bars a defendant from asserting that theory on appeal. *Avelar II* at 706, 931 P.2d at 1224.

Avelar now challenges the execution of the sentence imposed in that second trial. Avelar argues that he should be able to challenge the execution of the sentence, although he was unable to challenge the trial itself, because of the intervening payment of the drug stamp tax. Since any double jeopardy challenge that existed prior to the beginning of Avelar's second trial was waived under I.C.R. 16(b)(6) as recognized in *Avelar II*, Avelar's current contention is dependent upon a distinction between the attachment of jeopardy in the context of punishment and the attachment of jeopardy in the context of prosecution. Avelar argues that although jeopardy may have attached in this case in the prosecution context, jeopardy did not attach in the punishment context until Avelar paid the drug stamp tax. Thus, Avelar contends that his current double jeopardy challenge did not exist before trial; it could not have been raised until jeopardy attached in the punishment context.

In support of his position, Avelar relies upon *U.S. v. Von Moos*, 660 F.2d 749 (9th Cir. 1981). In *Von Moos* the defendant committed perjury during his trial for bank robbery. The judge considered the perjury when sentencing the defendant on the bank robbery conviction. When the defendant subsequently pled guilty to perjury, the judge entered an order stating that he had no legal authority to sentence the defendant for perjury because the perjury was used to enhance his sentence for bank robbery. On appeal, the Ninth Circuit first noted that

> Jeopardy attaches in the double punishment context when the defendant begins serving the sentence. *See*

> *United States v. Ford*, 632 F.2d 1354, 1380 (9th Cir. 1980). Because Von Moos has not begun serving a sentence pursuant to the challenged order, jeopardy has not attached. If we were to reverse and remand for sentencing, the sentence on remand would not constitute double jeopardy.

Von Moos, 660 F.2d at 749. The court then reversed and remanded the case for sentencing holding that considering perjury in sentencing does not implicate double jeopardy.

In *Ford*, the case relied upon in *Von Moos*, the trial court sentenced the defendand, and he was then released on bail. Two days later the defendant was returned to court, his sentence was vacated, and he was resentenced to correct an error that the judge perceived in the sentence and to "conform to [the judge's] original intent." *Ford*, 632 F.2d at 1379-80. In response to the defendant's double jeopardy argument, the Ninth Circuit held that "the mere pronouncement of the first sentence [did not] place [ ] Armstrong in jeopardy so as to make that first sentence uncorrectable . . . . [A] district judge may promptly act to correct a misspoken sentence when the defendant has not started serving that sentence." *Ford*, 632 F.2d at 1380. Relying upon *Von Moos*, Avelar argues that jeopardy does not attach in the punishment context until the sentence has been executed.

Avelar's reliance upon *Von Moos* is misplaced. The cases upon which *Von Moos* relies, including *Ford*, are no longer sound law. *See U.S. v. Groceman*, 882 F.Supp. 976 (E.D. Wash. 1995). Furthermore, the Ninth Circuit has recently rejected *Von Moos* and *Ford* in a case that is factually similar to Avelar's. In *U.S. v. Faber*, 57 F.3d 873 (9th Cir. 1995), the defendant entered a conditional plea of guilty to conspiracy in February. In March, the

defendant executed a Settlement Agreement in a civil forfeiture proceeding that had been instituted along with the criminal charge. The defendant then challenged the court's attempt to sentence him on the criminal charge because jeopardy attached first in the civil proceeding. The court held that jeopardy attached when the defendand entered his guilty plea and that the question of whether the civil forfeiture proceeding violated double jeopardy was not before it. In a footnote, the court stated:

> Faber contends that jeopardy does not attach in a criminal case until a defendant begins serving the sentence imposed. Faber cites [*Von Moos*] for support. That case and the Ninth Circuit case upon which it relies, [*Ford*], dealt with the issue of double punishment in the context of deciding whether a convicted criminal could be resentenced and given additional punishment once the original sentence had begun. These cases are not applicable here.

Faber, 57 F.3d at 874. The First Circuit also rejected a similar argument in *U.S. v. Pierce*, 60 F.3d 886 (1st Cir. 1995).

> Although he does not say so explicitly, Pierce implies that a criminal defendant should have the right to withhold objection to a forbidden successive prosecution and raise a double jeopardy argument only in the event that the second prosecution leads to a prior and less severe punishment than that meted out in the original case. Put another way, a defendant ought to have the option to endure an unconstitutional second trial in the hope that it will both conclude first and lead to a more lenient punishment than that eventually imposed in the first trial, and then to object to the punishment imposed

> in the first trial on double jeopardy grounds. We cannot locate any authority to support this proposition, and we reject it out of hand.
>
> The Double Jeopardy Clause is a shield against the oppression inherent in a duplicative, punitive proceeding; it is not a tool by which a defendant can avoid the consequences of the proceeding in which jeopardy first attached.

Pierce at 890.

We reject Avelar's bifurcated view of the attachment of jeopardy. We hold that a distinction between punishment and prosecution with regard to the attachment of jeopardy such as that suggested by *Von Moos* is not warranted or necessary. It would be unworkable, and would not provide any more protection for defendants. The initiation of criminal proceedings, by necessity, occurs at some point in time before the imposition of punishment in those proceedings. Thus, jeopardy will attach first in the prosecution context. Any punishment that would be barred by the attachment of jeopardy in the punishment context, would already be barred by the attachment of jeopardy in the prosecution context. A defendant can receive additional protection under the rule suggested by Avelar only by acquiescing in an impermissible prosecution in the hope of obtaining a more lenient punishment.

The propriety of both punishments and prosecutions must be considered in relation to the point where jeopardy first attached. The double jeopardy clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction *more than once* for an alleged offense." *U.S. v. Pierce*, 60 F.3d 886, 889 (1st Cir. 1995) (quoting *Green v. U.S.*, 355 U.S. 184, 187 (1957) (emphasis supplied)). In the context of punishments meted out in different proceedings, only the sec-

ond proceeding is constitutionally vulnerable. *See, e.g., Pierce, supra; U.S. v. Idowu,* 74 F.3d 387 (2nd Cir. 1996); *U.S. v. Faber,* 57 F.3d 873 (9th Cir. 1995); *U.S. v. Barton,* 46 F.3d 51 (9th Cir. 1995); *U.S. v. Groceman,* 882 F.Supp. 976 (E.D. Wash. 1995); *Petition of Maxfield,* 915 P.2d 1134, 1136 (Wash. App. 1996).

We hold that jeopardy attached in this case during the criminal proceedings against Avelar when the jury was sworn in his *first* trial. Since jeopardy attached first in the criminal proceedings, we need not decide whether a subsequent civil tax proceeding implicated double jeopardy. Avelar *may* have been able to raise double jeopardy as a defense to the tax proceedings as the defendants successfully did in *Dep't of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767 (1994). He chose not to do so. Avelar's second criminal conviction was upheld in *Avelar II.* He cannot now challenge the execution of the sentence imposed pursuant to that conviction based upon potentially improper tax proceedings that he allowed to continue. The double jeopardy clause protects individuals from the hazard, inconvenience, and expense of multiple prosecutions and punishments. The double jeopardy clause does not protect the defendant who endures multiple prosecutions in the hope of playing one punishment off against another.

II.
RULE 34 MOTION FOR NEW TRIAL

Avelar argues that he is entitled to a new trial because the state failed to disclose the illegal acts of John Nunez, one of the principal witnesses against Avelar, in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). Nunez was a police informant who helped to set up the police operation that resulted in Avelar's conviction. Nunez was a

confidential informant and not a police officer during the investigation of the case against Avelar, however, he subsequently became a police officer, and was a police officer at the time of Avelar's second trial. Following Avelar's conviction, Nunez was convicted of a variety of criminal activity relating to his work on the drug task force.[3] Nunez's criminal activity took place while he was a police officer and prior to Avelar's second trial. Avelar contends that the prosecution should have disclosed Nunez's criminal activity because it would have assisted Avelar's counsel in undermining Nunez's credibility at trial. Based upon the newly discovered evience of Nunez's criminal activity, Avelar argues that he is entitled to a new trial under I.C.R. 34. We disagree.

"The duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense." *State v. Gardner,* 126 Idaho 428, 433, 885 P.2d 1144, 1149 (Ct. App. 1994). However, a prosecutor is not required to disclose "evidence the prosecutor does not possess or evidence of which the prosecutor could not reasonably be imputed to have knowledge or control." *U.S. v. Macfarlane,* 759 F.Supp. 1163, 1168 (W.D. Pa. 1991). The trial judge found that the prosecution was not actually aware of Nunez's illegal activity, and this finding is not challenged on appeal. Consequently, Avelar must show that the knowledge of Nunez's activities can be imputed to the prosecution.

We hold that knowledge of Nunez's criminal activity may not be imputed to the prosecution on the facts of

---

[3]Nunez's appeal from his conviction is currently before this Court.

this case. Although Nunez was subsequently hired as a police officer, he was merely a paid informant at the time of the investigation, and was acting in that role when he testified at trial. Possession of information held in the minds of government witnesses is generally not imputed to the prosecution unless that information was discovered by police or prosecutors. *See U.S. v. Wilson*, 116 F.3d 1066, 1082 (5th Cir. 1997) (police not required to investigate government witness' mental state). Consequently, any information that Nunez possessed about his own ongoing criminal activity can not be imputed to the prosecution, and the prosecution did not suppress information in violation of *Brady*.

The district court properly denied Avelar's I.C.R. 34 motion for a new trial.

III.
RULE 48 MOTION

Avelar moved to dismiss this action pursuant to I.C.R. 48(a)(2) based upon his good behavior during the lengthy appellate process and the unforgiving immigration consequences of the conviction. Idaho Criminal Rule 48 provides

> (a) **Dismissal on motion and notice.** The court, on notice to all parties, may dismiss a criminal action upon its own motion or upon motion of any party upon either of the following grounds:
>
> (1) For unnecessary delay in presenting the charge to the grand jury or if an information is not filed within the time period prescribed by Rule 7(f) of these rules, or for unncesssary delay in bringing the defendant to trial, or

(2) For any other reason, the court concludes that such dismissal will served the ends of justice and the effective administration of the court's business.

I.C.R. 48(a)(1)-(2).

On its face, I.C.R. 48(a)(2) has two requirements: (1) that dismissal serve "the ends of justice," and (2) that dismissal serve "the effective administration of the court's business." Avelar does not address how the effective administration of the court's business will be served by dismissing this case. Indeed he acknowledges that a dismissal under this rule would not bar reprosecution. I.C.R. 48(c). Avelar instead focuses on the harsh personal consequences of the conviction. Rule 48(a)(2) is not the vehicle for such a challenge, particularly following an unsuccessful appeal. Although Rule 48 does not contain an explicit time limitation, the language indicates at least an implicit limitation. The likelihood that a dismissal will serve the effective administration of the court's business decreases as the case proceeds to a final judgment and disappears following an unsuccessful appeal.

The district court correctly denied Avelar's Rule 48 motion to dismiss.

CONCLUSION

The district court's denial of Avelar's motion to dismiss, or, in the alternative, for a new trial is affirmed.

Chief Justice TROUT, Justices SILAK, SCHROEDER and Justice, Pro tem, JOHNSON, **CONCUR.**

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent

v.

ANTONIO AVELAR,

Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING

NO. 24020
Ref. No. 99RH-12

The Appellant having filed a PETITION FOR REHEARING on April 22 1999 and supporting MEMORANDUM on May 6, 1999 of the Court's Opinion released April 2, 1999; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 7th day of July, 1999.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Judge Daniel B. Meehl